IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN

1. S.B. Criminal Appeal No.45/2003

Jamil S/o Jahur Shah
Versus
State of Rajasthan through Public Prosecutor

AND
2. S.B. Criminal Appeal No.43/2003

Siddiq S/o Mohamood Meo
Versus
State of Rajasthan

AND
3. S.B. Criminal Appeal No.44/2003

Netram S/o Shri Basanti Lal
Versus
State of Rajasthan through Public Prosecutor

AND
4. S.B. Criminal Appeal No.1703/2002

Rajendra S/o Sampat Ram
Avinash alias Billu
Versus
State of Rajasthan through its PP

AND
5. S.B. Criminal Appeal No.177/2003

Ramzan S/o Safeda Mev
Kallu S/o Safeda Mev
Versus
State of Rajasthan

Date of Judgment :::: 17th May, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Presence in Appeal No.45/2003 & 177/2003

Shri N.A. Naqvi with
Shri C.P. Meena, Counsel for accused-appellant Jamil, Ramzan and Kallu
Smt. Nirmala Sharma, P.P., for the State

Presence in Appeal No.43/2003

Shri R.K. Mathur, Counsel for accused-appellant Siddiq
Smt. Nirmala Sharma, P.P., for the State

Presence in Appeal No.44/2003

Shri Praveen Balwada with
Shri Hukam Chand Sharma, and
Shri Suresh Dhanwal, and
Shri O.P. Jhajharia, Counsel for accused-appellant Netram
Smt. Nirmala Sharma, P.P., for the State

Presence in Appeal No.1703/2002

Shri Virendra Singh Yadav, Counsel for accused-appellants – Rajendra and Avinash
Smt. Nirmala Sharma, P.P., for the State

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//Reportable//

By the Court:-

These five appeals, on behalf of seven accused-persons, namely, (1) Jamil S/o Jahur Shah, (2) Siddiq S/o Mohamood Meo, (3) Netram S/o Shri Basanti Lal, (4) Rajendra S/o Sampat Ram, (5) Avinash alias Billu S/o Shri Bonre Lal, (6) Ramzan S/o Safeda Meo, and (7) Kallu S/o Safeda Meo, are directed against the common judgment and order dated 12th December, 2002, passed by the Additional District & Sessions Judge (Fast Track) Behror, District Alwar, in Sessions Case No.22/2002 (26/2001), therefore, these appeals were heard together and are being disposed of by this common judgment.

The trial court has convicted and sentenced the

accused-appellants as under:-

Accused-Appellants	Under Sections	Sentence of Imprisonment
Jamil, Ramzan, Kallu and Siddiq	395, IPC	Each accused to undergo 10 years RI and a fine of Rs.1,000/-; in default of payment of fine, each of them to further undergo three months additional simple imprisonment.
	397, IPC	Each accused to undergo 10 years RI and a fine of Rs.1,000/-; in default of payment of fine, each of them to further undergo three months additional simple imprisonment .
	458, IPC	Each accused to undergo 7 years RI and a fine of Rs.500/-; in default of payment of fine, each of them to further undergo one month's additional simple imprisonment .
Avinash @ Billu, Rajendra and Netram	412, IPC	Each accused to undergo 7 years RI and a fine of Rs.1,000/-; in default of payment of fine, each of them to further undergo three months additional simple imprisonment .

All the sentences were ordered to run concurrently.

Shri R.K. Mathur and Shri N.A. Naqvi, the learned counsel for accused-appellants – Jamil, Ramzan, Kallu and Siddiq, argued the case at length on merits, but, during the course of arguments, in view of the overwhelming evidence against these four accused-appellants, and keeping in view the information given by these accused under Section 27 of the Evidence Act, the recovery of articles in pursuance of that information, the identification-memo in respect of those articles, the identification-parade conducted in presence of these accused-persons and further the identification of these accused-persons by the prosecution witnesses, rightly did not

press their appeals on merits, and contended that looking to all the facts and circumstances of the case, particularly the delay in recovery of articles. the sentence of imprisonment awarded by the trial court against these accused-appellants under Sections 395 and 397, IPC, may be reduced to a period of 7 years RI, which is the minimum sentence prescribed under Section 397, IPC.

Shri V.S. Yadav and Shri Praveen Balwada, the learned counsel for accused-appellants Avinash @ Billu, Rajendra and Netram, contended that the so-called recovery of ornaments made on the basis of information given by these accused-persons under Section 27 of the Evidence Act, is doubtful as both the independent-witnesses to the recovery memo have been declared hostile; a conviction should not be recorded only on the basis of statement of the Investigating Officer. They further contended that as per the statement of PW-3 Gyanwati, it is clear that other articles were not mixed with the articles, in dispute, alleged to have been recovered from the possession of these three accused-appellants, therefore, there was no proper identification of the articles and the same is liable to be discarded and, in these circumstances, they contended that the accused-appellants are entitled to get benefit of doubt, and the trial court has committed an illegality

in convicting them under Section 412 IPC. They, alternatively, contended that, in case, the statement of PW-17 Sudhir, the Investigating Officer, is believed and from the recovery of articles it is proved that the articles were recovered from their possession, then, at the most, the conviction of these three accused-appellants could have been recorded only under Section 411, IPC, and not under Section 412, IPC. In support of their contention, they also referred some judgments of this Court as well as of the Hon'ble Apex Court.

The learned Public Prosecutor supported the judgment passed by the trial court and contended that there is no merit in any of the appeals and all the appeals are liable to be dismissed.

I have considered the submissions of the learned counsel for all the parties and minutely scanned the impugned judgment as well as the record of the trial court.

Briefly stated the facts of the case are that on 2.5.1999 a written-report (Exhibit P-1) was lodged by PW-1 Girdharilal at Police Station Behror, wherein it was mentioned that his house is situated in Mohallah Manpura at Behror. He further alleged that when he, his wife and his grandson (daughter's son) were sleeping, some persons, armed with knife and pistol, committed criminal trespass in his house and

gave beating on their persons; they also stolen the articles as mentioned in the report in addition to cash amount of Rs.10,000/-.

On the basis of above written-report, the police registered FIR No.190/99 under Sections 458 and 380, IPC. The investigation commenced. Exhibit P-3, the site-plan, was prepared. Girdharilal was medically examined. However, during investigation of the case, the police could not collect any evidence against any person, therefore, final-report was given in the case. Subsequently, on 29.1.2001, the Investigating Officer, received a secret information from one informer that some persons of village Behror itself, namely, Avinash @ Billu, Rajendra and 6-7 other persons were involved in this incident; thus the matter was re-investigated. The accused Avinash and Rajendra were arrested. Thereafter other persons were also arrested, and, on the basis of their information, recoveries of some articles were made.

After completion of investigation, the prosecution filed a charge-sheet against accused Avinash, Rajendra, Netram and Jamil under Sections 458, 395, 397 and 398, IPC, on 27.4.2001. Investigation was kept pending under Section 178 (8) of the Cr.P.C. Subsequently, a charge-sheet was filed against accused Ramzan Meo and Kallu on 6.8.2001 and against accused Siddiq Meo on 1.4.2002 under Sections

458, 395, 397 and 398, IPC.

The trial court framed charge against all the seven accused-persons under Sections 458, 395, 397 and 398, IPC, who denied the same and claimed a trial.

The learned trial court, after considering the evidence on the record acquitted all the accused-appellans from the charge under Section 398, IPC. Three accused-appellants, namely, Avinash @ Billu, Rajendra and Netram were also acquitted from the charge under Sections 458, 395 and 397, IPC, but they were convicted and sentenced under Section 412, IPC, and other four accused-appellants, namely Jamil, Ramzan, Kallu and Siddiq were convicted and sentenced under Sections 458, 395 and 397, IPC, as mentioned above.

In the present case, there are two sets of accused; one set consists of Jamil, Ramzan, Kallu and Siddiq, who have been convicted under Sections 458, 395 and 397, IPC; another set consists of Avinash @ Billu, Rajendra and Netram, who have been convicted under Section 412, IPC, by the trial court.

The conviction order of appellants Jamil, Ramzan, Kallu and Siddiq has not been challenged by their respective counsel, therefore, it is not necessary to discuss the prosecution evidence in detail, but necessary relevant evidence against them in brief are considered and referred hereinafter.-

Appellant Jamil was arrested on 30.1.2001 vide arrest-memo Exhibit P-8; accused Ramzan on 21.6.2001 vide arrest-memo Exhibit P-27; accused Kallu on 21.6.2001 vide arrest-memo Exhibit P-28; accused Siddiq was arrested on 23.1.2001. Thereafter accused Jamil gave an information (Exhibit P-24) under Section 27 of the Evidence Act, to PW-17 Sudhir Kumar, the Investigating Officer, about ornaments stolen/robbed by him in the alleged dacoity committed during the intervening night of 1st/2nd May, 1999, at the residence of PW-1 Girdharilal and in pursuance thereof, PW-17 Sudhir Kumar, vide Exhibit P-20 dated 7.2.2001, recovered the articles from the place as informed by him. Exhibit P-21 is the site-plan of the said particular place. The articles were identified by PW-3 Gyanwati. The accused-persons were also identified in the identification-parade. The articles recovered from Jamil were identified before PW-16 Kantilal by PW-3 Gyanwati W/o Girdharilal PW-1, vide Exhibit P-5-A. Accused Jamil was identified by PW-5 Dalchand, in the identification-parade (Exhibit P-9) prepared by PW-15 Rita Tejpal, the Munsif and Judicial Magistrate, who also proved Exhibit P-9. Accused Ramzan and Kallu were identified by PW-5 Dalchand in the identification-parade conducted by PW-15 Rita Tejpal, the Munsif and Judicial Magistrate, vide Exhibit P-10 and Exhibit P-11 dated 23.6.2001. No recovery of weapon was made

from these two accused-persons. Similarly, the accused Siddiq was also rightly identified by PW-1 Girdharilal and PW-5 Dalchand, but, at his instance, no recovery of weapon was made.

PW-1 Girdharilal sustained injury in the said incident. His injury-report is Exhibit P-4, which has been proved by PW-6 Dr. Shivnarain Yadav.

In view of the above prosecution evidence, I find that the learned counsel appearing on behalf of the appellants Jamil, Ramzan, Kallu and Siddiq, were right in not challenging the order of conviction of these four accused-appellants under Sections 458, 395 and 397, IPC, and no interference is called for in the order of their conviction and the same is upheld.

Now, the case of remaining three accused-appellants Avinash @ Billu, Rajendra and Netram is taken up.

The trial court has acquitted these accused-appellants from the charge under Sections 458, 395, 397 and 398, IPC, but these appellants have been convicted by the trial court under Section 412, IPC. The trial court has considered the statements of PW-1 Girdharilal and PW-3 Gyanwati, who, in their statements, have admitted that these three accused-appellants were residents of Behror itself and two, out of them, were their neighbourers, but their names were not mentioned in the written-report (Exhibit P-1)

and their names did not come on the record for about one-and-half-year and final-report was given in the matter. However, on the basis of secret information of informer, they were made accused in the case. PW-1 Girdharilal and PW-3 Gyanwati took their names before the trial court during their examination-in-chief, and the trial court reached to a conclusion that there is improvement in the statements of PW-1 and PW-3, and consequently acquitted these three accused-appellants from all the charges, but convicted them under Section 412, IPC, on the basis of recovery of articles made from their possessions.

The learned counsel for the appellants contended that the recovery-memos of so-called stolen/robbed articles recovered from the possession of these three accused are Exhibit P-16, Exhibit P-17 and Exhibit P-19. The independent witnesses to these recovery-memos are - PW-8 Rohtash and PW-13 Bhupendra in the case of accused Avinash; PW-7 Ramesh, PW-9 Madanlal and PW-18 Shiv Kumar in the case of accused Rajendra; PW-10 Chhaganlal, PW-11 Bholaram and PW-12 Nagarmal in the case of accused Netram. All these independent witnesses to these recovery-memos were declared hostile by the prosecution during trial of the case. Their further contention is that PW-3 Gyanwati, in her statement, admitted that at the time of identification of these articles by her, the extra

articles were not mixed in these articles, which were recovered vide Exhibit P-16, Exhibit P-17 and Exhibit P-19, therefore, there was no proper identification of the articles recovered from their possession and in these circumstances there is no cogent evidence to prove the recovery of articles from their possession except the statement of PW-17 Sudhir Kumar. It is relevant to mention that these accused-appellants were arrested on 29.1.2001 and 31.1.2001, and they gave information under Section 27 of the Evidence Act to PW-17 Sudhir Kumar, vide Exhibit P-22, Exhibit P-23 and Exhibit P-25, and, in pursuance of that information, the disputed articles were recovered vide recovery-memos Exhibit P-16, Exhibit P-17 and Exhibit P-19.

PW-17 Sudhir Kumar has proved the memos of information given to him by accused-appellants and recovery of articles made by him as per the aforesaid information from the place narrated by them. Although the 'motbirs' of these recovery-memos have been declared hostile, but these articles have been proved by PW-17 Sudhir Kumar.

The question, which arises for consideration in the facts and circumstances of the present case, is whether these recovery-memos should be believed on the basis of statement of PW-17 Sudhir Kumar, or not. PW-17 is the Investigating Officer. Normally

corroboration of sole testimony is required to believe it beyond doubt, but, if sole testimony is found to be trustworthy and unshaken, and that there is no reason to disbelieve sole testimony, the same can be relied upon to prove the recovery of the articles made by Investigating Officer also. However, in that eventuality, the courts are required to scrutinize the statement of sole witness carefully and with cautious, and after considering the statement of PW-17 Sudhir Kumar minutely I find that even if the independent witnesses of these recovery-memos have been declared hostile, the recovery of articles made from the possession of the accused-appellants can be believed on the basis of sole testimony of PW-17 Sudhir Kumar. (Reference may be given to G.Sriniwas Goud Vs. State of Andhra Pradesh, reported in 2005 (2) Supreme 267, wherein the Hon'ble Apex Court held that Accused can be convicted on sole testimony of Government witnesses if their testimony is trustworthy.

The question now arises for consideration is whether offence under Section 412, IPC, is made out or not, in the facts and circumstances of the present case.

For ready reference it will be appropriate to refer Sections 411 and 412 of the IPC, to resolve the present controversy:

> "411. **Dishonestly receiving stolen property**.- Whoever dishonestly receives or retains any stolen property, knowing or

> having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."
>
> **"412. Dishonestly receiving property stolen in the commission of a dacoity.**- Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

This Court in **Chammu and Another Vs. The State of Rajasthan - 1971 (4) WLN 260**, considered the essential ingredients to prove the offence under Section 412, IPC, and also the distinction in between the offence under Section 411 and 412, IPC, and after considering the same held as under:-

> "5. The only question that survives for consideration is whether Chammu is guilty under section 412 or S.411, I.P.C. There is no adequate evidence on the record to show that Chammu had the knowledge that the above articles formed part of a dacoity. For the applicability of S.412 I.P.C., it is necessary for the prosecution to prove (1) that the property in question was stolen property, (2) that the possession of such property was transferred by commission of a dacoity, and (3) that the accused received or retained such stolen property. In so far as the recovery of the property from the possession of the accused is concerned, unless the accused explains as to how he

> acquired possession over the property, a presumption under illustration (a) to S.114, Evidence Act, can be drawn and it can be held that either he is a thief or a receiver of stolen property. But for the applicability of S.412, I.P.C. The prosecution has to show something more than the mere possession of the stolen goods. S.412, I.P.C., requires that the receiver should know or have reason to believe that the property had been transferred to him on account of commission of a dacoity. If the prosecution is only able to show mere possession, the proper section applicable is S.411, I.P.C. In support of this proposition reliance is placed on a Division Bench judgment of this court reported as Bhurgiri and another Vs. The State (ILR 1953 (4) Raj. 476), which has been approved by their Lordships of the Supreme Court in Sheo Nath Vs. State of U.P. (1970 U.J. (S.C.) 111. In this case it has not been shown that the accused Chammu knew that a dacoity has been committed and that goods had been stolen in the course of the commission of that dacoity. The identification evidence produced on behalf of the prosecution in respect of Chammu has not been relied upon by the trial court. On the facts of this case, it seems to me that the only legitimate inference which can be drawn is that Chammu knew that the property was stolen, though it cannot be presumed that the accused knew that it was connected with dacoity. Chammu can, therefore, only be convicted under S.411, I.P.C."

The Hon'ble Supreme Court also considered the scope of distinction of Sections 411 and 412, IPC, in <u>Moinuddin Mazumdar v. The State of Assam - (1972 Cri.L.J. 456 = AIR 1972 SC 635</u>) and held as under:-

> "4. .....For the purposes of conviction under Section 412, Indian Penal Code the Court must come to the conclusion that the dishonest receiver of the stolen property should be in possession of the same

knowing or having reason to believe that its possession had been transferred by the commission of dacoity. Having regard to the fact that the studio camera was unlikely to change many hands before it was traced to the appellant on 5-3-1965 it might be permissible to presume that the appellant must have received the same knowing that it had been stolen in a dacoity. But the High Court has not given a clear finding on the fact though it reduced the sentence imposed by the Trial Court to one year's rigorous imprisonment. The High Court made the following observation:

> "I, however, find that the sentence has been rather very harsh. The accused purchased the camera obviously knowing it to be a stolen property because he got it cheap. In these circumstances I think rigorous imprisonment for one year will meet the ends of justice. The sentence is altered accordingly. There will be no fine."

It would appear from the above that the High Court felt that the offence must be one under Section 411, Indian Penal Code, in which case, it would have been only fair if the conviction under Section 412, Indian Penal Code was changed to one under Section 411, Indian Penal Code. In these circumstances, we think that we should regularize the conviction by convicting the accused under Section 411, Indian Penal Code. ....."

This Court in **Balya Alias Balaram & Others v. State of Rajasthan - 1977 Cr.L.R. (Raj.) 284**, while considering the ingredients of Section 412, IPC, held as under:-

> "6. .....For the applicability of S.412, I.P.C., it is necessary for the prosecution to prove: (i) that the property in question was stolen property, (ii) that the possession of such property

> was transferred by commission of a dacoity, and (iii) that the accused received or retained such stolen property. In so far as the recovery of the property from the possession of the accused-appellants is concerned, unless they explain as to how they acquired possession over the property a presumption under Illustration (A) to S.114, of the Evidence Act can be drawn and it can be held that the either he is a thief or a receiver of the stolen property, but for the applicability of S.412, I.P.C. the prosecution has to show something more than the mere possession of the stolen goods. In this case the identification evidence produced on behalf of the prosecution in respect of the accused has not been relied upon by the trial court, and the evidence regarding extra judicial confession has been rejected by me. .....”

The above referred provisions of law as well as case law, make it clear that the following ingredients are necessary to prove the offence under Section 412, IPC, against an accused:-

(i) That the property in question is stolen property,

(ii) That its possession was transferred by the commission of dacoity;

(iii) That the accused received or retained such stolen property;

(iv) That he did so dishonestly;

(v) That he then knew that -

(a) the property he received had been transferred by the commission of dacoity, or

(b) that the transferor was a dacoit or belonged to a dacoity gang, in which case, prove further that he

> knew or reason to believe that the property he received was stolen property.

An accused-person cannot be convicted under Section 412, IPC, only on the basis of possession of stolen articles. Section 412, IPC, requires that the receiver should know or have reason to believe that the property had been transferred to him on account of commission of a dacoity. If the prosecution is able to prove mere possession only, the proper section applicable is Section 411, IPC.

Now coming to the evidence available in the present case is concerned, it is clear that these three accused-appellants, Avinash @ Billu, Rajendra and Netram, were not named in FIR, particularly when they were residents of same village i.e. Behror and two accused-appellants were neighbourers of the complainant-party also. PW-1 Girdharilal and PW-3 Gyanwati, both, have admitted that these accused-appellants were known to them. On the basis of so-called secret information from informer, after about one-and-half-year i.e. on 29.1.2001, the Investigating Officer started investigation against these accused-persons and on the basis of information alleged to have been given under Section 27 of the Evidence Act, the so-called recoveries of the articles were made from their possession and charge-sheet was filed

against them under Sections 458, 395, 397 and 398, IPC.

The learned trial court after considering the prosecution evidence on the record, acquitted these three accused-appellants from all the charges, but, in view of the recoveries of articles made from their possession in pursuance of the information given by them under Section 27 of the Evidence Act, convicted them under Section 412, IPC.

The learned trial court has not understood the distinction in between the offence under Sections 411 and 412, IPC. As discussed above, one of the ingredients of Section 412, IPC, is that possession of such property must be transferred to accused by commission of a dacoity, and another is that accused must receive or retain such articles as stolen property. There is no prosecution evidence in the present case to prove that these three accused-appellants purchased the disputed articles from main accused-appellants Jamil, Ramzan, Kallu and Siddiq, who have been convicted by the trial court under Sections 395 and 397, IPC. There is no evidence to show that they were having knowledge that these articles were stolen property or the same have been transferred by the commission of a dacoity. The charge against these three accused-appellants was in respect of offence under Sections 395 and 397, IPC, itself and

the trial court, after considering the evidence on the record, acquitted these accused-persons from these charges.

So far as possession of these articles is concerned, the same is proved, as discussed above, on the basis of the statement of PW-17 Sudhir Kumar and on that basis, a presumption can be raised, against them in respect of offence under Section 411, IPC, under Illustration (a) to Section 114 of the Evidence Act, therefore, in these circumstances, I find that the trial court has committed a serious illegality in convicting these three accused-appellants under Section 412, IPC, but I find that they are liable to be convicted under Section 411, IPC. However, this presumption was subject to rebuttal but these three accused-appellants have not explained in any manner whatsoever as to how they came in possession of these articles and in absence of their cogent explanation, the presumption under Section 114(a) can be drawn against them.

Now the question for consideration is about the sentence of imprisonment to be awarded against the appellants.

The learned counsel for the appellants, namely, Jamil, Ramzan, Kallu and Siddiq did not challenge the order of conviction, but their only contention is that initially final-report was given in the matter and

only on the basis of so-called secret information given on 29.1.2001 i.e. after one-and-half-year the accused-appellants were made as accused in the matter and further all independent witnesses were declared hostile, therefore, looking to all the facts and circumstances of the case, I think it fit and proper that ends of justice will meet in case they are awarded minimum sentence of imprisonment of seven years under Section 397, IPC, and same sentence of imprisonment is also awarded under Section 395, IPC.

So far as remaining three appellants, namely, Avinash @ Billu, Rajendra and Netram are concerned, it is contended on their behalf by their learned counsel that accused Avinash @ Billu and Rajendra have remained in jail from 29.1.2001 to 4.4.2001 during trial and from 12.12.2002 to 23.1.2003 after their conviction by the trial court and before suspension of their sentence by this Court, therefore, both have remained in custody for about 3 months and 16 days, and accused Netram remained in custody from 31.1.2001 to 28.3.2001 during trial and from 12.12.2002 to 23.1.2003 after his conviction by the trial court and before suspension of his sentence by this Court, therefore, he also remained in custody for about three months and six days. Therefore, they may be awarded sentence of imprisonment already undergone by them, under Section 411, IPC.

After considering all the facts and circumstances of the present case, I think it fit and proper that ends of justice will meet if they are awarded sentence of imprisonment already undergone by them under Section 411, IPC.

Consequently, all the appeals filed on behalf of all the appellants are partly allowed. The impugned judgment and order passed by the trial court is modified. The conviction and sentence of accused-appellants - Jamil, Ramzan, Kallu and Siddiq under Section 458, IPC, is maintained, but, while maintaining their conviction under Section 395 and 397, IPC, their sentence of imprisonment is reduced from 10 years RI to 7 years RI in each offence with fine of Rs.1,000/- each; in default of payment of fine; each of these appellants to further undergo 1 month’s additional simple imprisonment.

The conviction and sentence of appellants Avinash @ Billu, Rajendra and Netram passed by the trial court under Section 412, IPC, are set-aside and they are convicted under Section 411, IPC, and sentenced to a period of imprisonment already undergone by them, as mentioned above. They are on bail. Their bail-bonds stand discharged. They need not surrender.

Registry is directed to place a copy of this judgment in four other connected appeals.

(Narendra Kumar Jain) J.

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